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No. 06-590

In the Supreme Court of the United States

BERNARD J. EBBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to grant immunity for prospective defense witnesses.

2. Whether the district court erred in giving a conscious avoidance instruction.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 28

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984) 10, 13, 15
Autry v. *McKaskle*, 465 U.S. 1085 (1984) 10
DiMartini v. *United States*, 524 U.S. 916 (1998) 10
First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 20
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980) 11, 12, 13, 16
Griffin v. *United States*, 502 U.S. 46 (1991) 27
NCAA v. *Smith*, 525 U.S. 459 (1999) 19
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983) 10
Roviaro v. *United States*, 353 U.S. 53 (1957) 18
Tomala v. *United States*, 504 U.S. 932 (1992) 28
United States v. *Abbas*, 74 F.3d 506 (4th Cir.), cert. denied, 517 U.S. 1229 (1996) 10, 13, 14
United States v. *Adair*, 951 F.2d 316 (11th Cir. 1992) 21

Cases—Continued: Page

United States v. *Alvarez*, 358 F.3d 1194 (9th Cir.), cert. denied, 543 U.S. 887 (2004) 16
United States v. *Angiulo*, 897 F.2d 1169 (1st Cir.), cert. denied, 498 U.S. 845 (1990) 13, 14, 15
United States v. *Antzoulatos*, 962 F.2d 720 (7th Cir.), cert. denied, 506 U.S. 919 (1992) 20
United States v. *Arias*, 984 F.2d 1139 (11th Cir.), cert. denied, 508 U.S. 979 and 509 U.S. 932 (1993) 27
United States v. *Bahadar*, 954 F.2d 821 (2d Cir.), cert. denied, 506 U.S. 850 (1992) 10
United States v. *Baron*, 94 F.3d 1312 (9th Cir.), cert. denied, 519 U.S. 1047 (1996) 23
United States v. *Beckett*, 724 F.2d 855 (9th Cir. 1984) ... 26
United States v. *Bilis*, 170 F.3d 88 (1st Cir.), cert. denied, 528 U.S. 911 (1999) 23, 25, 26
United States v. *Blanche*, 149 F.3d 763 (8th Cir. 1998) 12
United States v. *Bordeaux*, 436 F.3d 900 (8th Cir. 2006) 11
United States v. *Bowling*, 239 F.3d 973 (8th Cir. 2001) 11
United States v. *Brandon*, 17 F.3d 409 (1st Cir.), cert. denied, 513 U.S. 820 (1994) 26
United States v. *Buljubasic*, 808 F.2d 1260 (7th Cir.), cert. denied, 484 U.S. 815 (1987) 17, 18
United States v. *Burns*, 684 F.2d 1066 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983) 13, 14
United States v. *Caminos*, 770 F.2d 361 (3d Cir. 1985) 21

Cases—Continued: Page

United States v. *Capozzi*, 883 F.2d 608 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990) 13, 16

United States v. *Caterino*, No. 90-50049, 1992 WL 33347 (9th Cir. Feb. 21, 1992), cert. denied, 506 U.S. 843 (1992) 25

United States v. *Cincotta*, 689 F.2d 238 (1st Cir.), cert. denied, 459 U.S. 991 (1982) 21

United States v. *Cohen*, 171 F.3d 796 (3d Cir. 1999) 13

United States v. *Condo*, 741 F.2d 238 (9th Cir. 1984), cert. denied, 469 U.S. 1164 (1985) 15, 17

United States v. *Croft*, 124 F.3d 1109 (9th Cir. 1997) 16

United States v. *de Francisco-Lopez*, 939 F.2d 1405 (10th Cir. 1991) 26

United States v. *Doe*, 465 U.S. 605 (1984) 10

United States v. *Epstein*, 426 F.3d 431 (1st Cir. 2005), cert. denied, 126 S. Ct. 1596 (2006) 24

United States v. *Espinoza*, 244 F.3d 1234 (10th Cir. 2001) 23, 26, 27

United States v. *Fierro*, 38 F.3d 761 (5th Cir. 1994), cert. denied, 514 U.S. 1030 and 1051 (1995) ... 21

United States v. *Garzon*, 688 F.2d 607 (9th Cir. 1982) ... 26

United States v. *Gold*, 743 F.2d 800 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985) 25

United States v. *Hooks*, 848 F.2d 785 (7th Cir. 1988) 10, 13, 15, 17, 18

United States v. *Hopkins*, 53 F.3d 533 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996) 22

United States v. *Jensen*, 69 F.3d 906 (8th Cir. 1995), cert. denied, 517 U.S. 1169 (1996) 21

Cases—Continued: Page

United States v. *Jewell*, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976) 21

United States v. *Kehoe*, 310 F.3d 579 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003) 12

United States v. *LaHue*, 261 F.3d 993 (10th Cir. 2001), cert. denied, 534 U.S. 1083 and 1084 (2002) 11, 13

United States v. *Lapsley*, 263 F.3d 839 (8th Cir. 2001) 18

United States v. *Lord*, 711 F.2d 887 (9th Cir. 1983) 13

United States v. *Lowell*, 649 F.2d 950 (3d Cir. 1981) 11, 15

United States v. *Lugg*, 892 F.2d 101 (D.C. Cir. 1989) ... 13

United States v. *MacKenzie*, 777 F.2d 811 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986) 21

United States v. *Mackey*, 117 F.3d 24 (1st Cir.), cert. denied, 522 U.S. 975 (1997) 10

United States v. *Mellen*, 393 F.3d 175 (D.C. Cir. 2004) 21

United States v. *Mendia*, 731 F.2d 1412 (9th Cir.), cert. denied, 469 U.S. 1035 (1984) 11

United States v. *Mitchell*, 886 F.2d 667 (4th Cir. 1989) 15

United States v. *Mohney*, 949 F.2d 1397 (6th Cir. 1991), cert. denied, 504 U.S. 910 (1992) 10, 13, 15, 17, 18

United States v. *Ochoa-Fabian*, 935 F.2d 1139 (10th Cir. 1991), cert. denied, 503 U.S. 961 (1992) 21

Cases—Continued: Page

United States v. *Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096 (9th Cir. 1985) 26
United States v. *Paris*, 827 F.2d 395 (9th Cir. 1987) 17
United States v. *Parker*, 364 F.3d 934 (8th Cir. 2004) ... 24
United States v. *Perkins*, 138 F.3d 421 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998) 11, 13
United States v. *Puche*, 350 F.3d 1137 (11th Cir. 2003) 23
United States v. *Ramsey*, 785 F.2d 184 (7th Cir.), cert. denied, 476 U.S. 1186 (1986) 21
United States v. *Reyes*, 362 F.3d 536 (8th Cir.), cert. denied, 542 U.S. 945 (2004) 12
United States v. *Rivera*, 944 F.2d 1563 (11th Cir. 1991) 21
United States v. *Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991) 25, 26
United States v. *Sawyer*, 799 F.2d 1494 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987) 11, 13
United States v. *Schnabel*, 939 F.2d 197 (4th Cir. 1991) 21
United States v. *Svoboda*, 347 F.3d 471 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004) 23
United States v. *Talley*, 164 F.3d 989 (6th Cir.), cert. denied, 526 U.S. 1137 (1999) 17
United States v. *Teague*, 443 F.3d 1310 (10th Cir.), cert. denied, 127 S. Ct. 247 (2006) 19
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) 15

Cases—Continued: Page

United States v. *Warshawsky*, 20 F.3d 204 (6th Cir. 1994) 21
United States v. *Westerdahl*, 945 F.2d 1083 (9th Cir. 1991) 14, 16, 17, 18
United States v. *Whittington*, 26 F.3d 456 (4th Cir. 1994) 21
United States v. *Whittington*, 783 F.2d 1210 (5th Cir.), cert. denied, 479 U.S. 882 (1986) 13
United States v. *Williams*, 469 F.3d 963 (11th Cir. 2006) 19
United States v. *Willis*, 277 F.3d 1026 (8th Cir. 2002) ... 23
United States v. *Young*, 86 F.3d 944 (9th Cir. 1996) 16
Wilson v. *United States*, 510 U.S. 1109 (1994) 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) 17

Constitution, statutes and rule:

U.S. Const. Amend. V 12, 14
15 U.S.C. 78j(b) 1
15 U.S.C. 78m(a) 2
15 U.S.C. 78ff 1, 2
18 U.S.C. 371 1
18 U.S.C. 6001 *et seq.* 10
Fed. R. Evid. 801(d)(2)(E) 5

Miscellaneous:

Model Penal Code § 2.02(7) (2001) 28

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 458 F.3d 110.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2006. The petition for a writ of certiorari was filed on October 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit securities fraud and related crimes, in violation of 18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and making false filings with the United States Securities

and Exchange Commission (SEC), in violation of 15 U.S.C. 78m(a) and 78ff. He was sentenced to 25 years of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-41a.

1. Petitioner was President and Chief Executive Officer (CEO) of WorldCom, Inc. (WorldCom), which provided worldwide telecommunications services. To provide those services, WorldCom built a global network of facilities, consisting largely of fiber-optic cables and telephone wires. WorldCom also leased access to network facilities operated by local and regional telephone companies. The fees that WorldCom paid to access those facilities, known as "line costs," were its largest expense. Pet. App. 2a, 4a; Gov't C.A. Br. 4, 6-7.

Until 2000, WorldCom's financial condition was strong. That year, however, the "dot-com bubble" burst, which reduced demand for WorldCom's telecommunications services and caused a significant decline in its financial results. Pet. App. 4a; Gov't C.A. Br. 7-8.

To hide WorldCom's deteriorating financial condition and failure to meet analysts' expectations, petitioner and WorldCom's Chief Financial Officer Scott Sullivan agreed to report false and misleading financial results. To that end, they instructed subordinates to book entries in WorldCom's general ledger that artificially increased its reported revenue and decreased its reported line-cost expenses, which, in the third quarter of 2000, were almost $1 billion higher than expected. Pet. App. 5a-11a; Gov't C.A. Br. 13-16.

Sullivan first dealt with the line-cost problem by instructing the controller and his subordinates to make ledger entries reducing line-cost expense accounts and to balance those entries by reducing various reserve

accounts. When that method was no longer possible because the reserve accounts had been exhausted, Sullivan, with petitioner's knowledge and approval, instructed the accounting department to reclassify a substantial portion of line costs from current expenses to capital expenditures. From the first quarter of 2001 through the first quarter of 2002, approximately $3.8 billion was transferred from line-cost expense accounts to capital-expenditure accounts. Pet. App. 6a-11a; Gov't C.A. Br. 15-16, 18, 22, 24-25, 27-28.

To address the revenue shortfall, Sullivan, again at petitioner's direction, instructed others to increase WorldCom's publicly reported revenue by including certain items that WorldCom had not previously included in its revenue totals. Petitioner, Sullivan, and other executives also created a new process called "Close the Gap," designed to identify adjustments that would increase reported revenue in order to meet analysts' expectations for revenue growth. Petitioner understood that many of the revenue adjustments were misleading without additional disclosures. At the June 2001 board meeting, several board members questioned Chief Operating Officer (COO) Ron Beaumont about the "Close the Gap" program after he had presented some slides to them, and one member approached Sullivan privately to question him about the program. Sullivan notified petitioner about the inquiries, and petitioner told Sullivan and Beaumont that "Close the Gap" information should not be presented at the next Board meeting. Pet. App. 5a, 8a-10a; Gov't C.A. Br. 15, 18, 23-27.

Petitioner was aware of both WorldCom's financial status and the false and misleading public financial reports because of various reports, briefings, and financial statements that he received. He not only reviewed the

quarterly financial statements that were filed with the SEC before they were released to the public and signed the Form 10-K Annual Reports, but he also examined internal financial statements and reports that revealed WorldCom's deteriorating financial condition and the improper adjustments that were made to conceal that deterioration. Gov't C.A. Br. 8, 10-13.

Throughout the fraud, petitioner stressed the importance of "hitting our numbers," *i.e.*, meeting analysts' expectations, and refused to issue earnings warnings or to revise earnings estimates. In each quarter from the third quarter of 2000 through the first quarter of 2002, WorldCom reported false and misleading financial results, and in nearly all of those quarters, petitioner personally made false and misleading statements to analysts and the public about WorldCom's business. Pet. App. 5a-11a; Gov't C.A. Br. 13-16, 18, 20-21, 24, 27.

2. a. At trial, the government proved its case through the testimony of 14 witnesses and more than 300 exhibits. Five witnesses, including Sullivan, signed cooperation agreements, in which they pleaded guilty to conspiracy and securities fraud in exchange for the government's promise that it would not further prosecute them. Two witnesses entered into non-prosecution agreements after acknowledging their criminal conduct and agreeing to cooperate with the government and to testify at petitioner's trial. The government granted statutory immunity to only one individual, Lisa Taranto, who testified at the trial after acknowledging her improper conduct at WorldCom. Gov't C.A. Br. 5, 37-38.

Petitioner testified in his own defense. He denied speaking with Sullivan about improper adjustments to line-cost expenses and claimed that he never noticed the adjustments on the reports that he reviewed. As to one

critical report on expenses, petitioner admitted that he received it but stated that, in 2001, he began throwing it in the trash without reading it. He acknowledged that he received preliminary and final revenue reports and attended various presentations, including on the "Close the Gap" program, but he denied that the information he learned caused him any concern or that he was ever told that there was anything improper about any of the adjustments to revenue. Gov't C.A. Br. 32, 68.

Three other witnesses testified for the defense. Petitioner also requested the district court to compel the government to grant immunity to three additional, prospective defense witnesses: Ron Beaumont, the COO, who was responsible, among other things, for presentations to petitioner and others on revenue results; Ron Lomenzo, who was the Senior Vice President of Financial Operations and prepared a key internal revenue report each month; and Stephanie Scott, Vice President for Financial Reporting. Petitioner claimed that the witnesses would exculpate him and would deny that they had made statements attributed to them by Sullivan and admitted as statements by co-conspirators, under Federal Rule of Evidence 801(d)(2)(E). The government filed an ex-parte declaration explaining its reasons for not immunizing the witnesses. Pet. App. 18a; Gov't C.A. Br. 10-11, 30, 32, 38-40.

The district court denied petitioner's motions on the immunity claim. The court found that the government had not engaged in any tactical manipulation in deciding not to immunize the witnesses and that the testimony petitioner sought to elicit from them would not "directly exculpate[]" him. Pet. App. 84a. Instead, the court concluded, the witnesses "would offer self-exculpatory testimony." *Ibid.* See *id.* at 57a-62a, 83a-91a.

b. Based in large part on petitioner's own testimony, the district court ruled that an instruction on conscious avoidance was appropriate. See Pet. App. 51a; Gov't C.A. Br. 68. The court instructed the jury as follows:

> [I]n determining whether [petitioner] knew of the existence of a particular fact, you may consider whether [petitioner] deliberately closed his eyes to what otherwise would have been obvious.
>
> The necessary knowledge on the part of [petitioner] with respect to Count Two and Counts Three through Nine cannot be established by showing that [petitioner] was careless, negligent, or foolish. In addition, you may not conclude that [petitioner] knew of the existence of a particular fact merely because he held the position of chief executive at WorldCom. However, one may not willfully and intentionally remain ignorant of a fact material and important to his conduct in order to escape the consequences of criminal law.
>
> Thus, if you find beyond a reasonable doubt that [petitioner] was aware that there was a high probability of a fact, but that [petitioner] deliberately and consciously avoided confirming this fact, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge, unless you find that [petitioner] actually believed the fact not to be true.

Pet. App. 110a. The government did not mention the instruction in its closing arguments and made only fleeting reference to petitioner's deliberate ignorance of the fraud during those arguments. Gov't C.A. Br. 87-88. Petitioner renewed his challenge to the instruction in his

motion for a new trial, which the district court denied. Pet. App. 48a-57a; Gov't C.A. Br. 69-70.

3. On appeal, petitioner again challenged the district court's refusal to compel the government to grant immunity to his witnesses and the court's jury instruction on conscious avoidance. Addressing defense witness immunity, the court of appeals first summarized the applicable standards. The court stated that a district court may order the prosecution to choose between granting use immunity to a potential defense witness and forgoing the testimony of its own immunized witnesses if the defendant makes a two-part showing. Pet. App. 16a-17a. First, the defendant must demonstrate that "the government has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through overreaching, or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation." *Id.* at 17a (citations and internal quotation marks omitted). Second, the defendant must show that the evidence is material, exculpatory, and not cumulative or available from another source. In other words, the court explained, the defendant must show that the witnesses's testimony "would materially alter the total mix of evidence before the jury." *Id.* at 18a.

Applying those standards, the court of appeals held that the district court did not abuse its discretion in denying petitioner's immunity requests. The court stated that it was "doubt[ful]" that petitioner could satisfy the first part of the test because "[t]here is no evidence of 'overreaching' or the manipulation of immunity expressly for tactical reasons." Pet. App. 18a-19a. The court found it unnecessary to decide whether the first part of the test was satisfied, however, because peti-

tioner had not satisfied the second part. *Id.* at 19a. He had not shown that the testimony of his prospective witnesses would be "material, exculpatory and not cumulative." *Id.* at 18a.

The court explained that Beaumont's proffered testimony that he was ignorant of some of the improper accounting practices did not exculpate petitioner. See Pet. App. 22a ("[E]ven if Sullivan kept Beaumont in the dark, that fact would not show [petitioner's] ignorance. Keeping the COO in the dark is different from keeping the CEO in the dark. Moreover, if Sullivan acting alone would have had a motive to conceal the scheme from Beaumont, Sullivan and [petitioner] acting in concert may well have had a similar motive."). Moreover, the court observed, several of Beaumont's claims of ignorance were unlikely to be credited by the jury. One was "devastatingly" refuted by documentary evidence, *id.* at 20a, and another was belied by common sense, *id.* at 21a. The court also concluded that Beaumont's proffered testimony that petitioner told him to include a "Close the Gap" slide at the June 2001 board meeting was not exculpatory. The court explained that the jury already knew the slide had been included, and Beaumont offered no explanation why information about the program was omitted from subsequent board presentations. *Id.* at 22a-23a.

As to Scott, the court concluded that her potential testimony that she did not know of the line-cost adjustments, which conflicted with Sullivan's testimony that she told him that capitalizing the line costs was improper accounting, did not exculpate petitioner, and had little, if any, value for impeaching Sullivan. Pet. App. 23a. Similarly, as to Lomenzo, the court found that any testimony about his view of the "Close the Gap" pro-

gram would have little probative value because he was not directly involved in it, and his claim that he did not feel added pressure in 2001 to meet revenue targets was not probative of petitioner's state of mind. *Id.* at 24a.

The court of appeals also held that the district court did not err in giving the conscious avoidance instruction. The appeals court explained that, under Second Circuit precedent, "[a] conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." Pet. App. 28a (citation omitted). The court concluded that petitioner's professed lack of knowledge of the fraud "easily met" the first part of that test, *id.* at 29a, and his own testimony about the practices in which he engaged to avoid knowing that the company's financial reports were false supported the second, *id.* at 29a-30a (noting that petitioner testified that he "us[ed] a procedure for signing documents he didn't bother to read in full, including the 10-Ks," and "toss[ed] the management budget variance report in the trash without reading it").

ARGUMENT

1. Petitioner contends (Pet. 10-19) that this Court should grant a writ of certiorari because the courts of appeals are "deeply divided on every aspect of defense witness immunity." Pet. 8. Petitioner overstates the disagreement among the courts of appeals, and none of the circuits would have granted petitioner's request for immunity for his witnesses. Indeed, we are aware of no federal court of appeals decision in the last 25 years that has ordered the government to immunize a defense wit-

ness and only a handful of decisions that have even ordered a hearing on the issue. This Court's review is therefore not warranted. This Court has consistently denied review of cases upholding the denial of immunity for defense witnesses. See, *e.g.*, *DiMartini* v. *United States*, 524 U.S. 916 (1998); *Wilson* v. *United States*, 510 U.S. 1109 (1994); *Autry* v. *McKaskle*, 465 U.S. 1085 (1984). There is no reason for a different result here. Review is particularly unwarranted because the court of appeals rested its decision on the finding that the witnesses in question did not have exculpatory testimony to offer, without addressing whether the government in any way abused its immunity power. Pet. App. 19a.

a. A district court does not have authority to grant immunity from prosecution. As this Court has recognized, the federal use immunity provisions, 18 U.S.C. 6001 *et seq.*, vest the power to grant immunity in the Executive Branch. Accordingly, "only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984). In accordance with those decisions, every court of appeals except one has held that a federal court may not grant immunity to defense witnesses without a request from the prosecution. See *United States* v. *Mackey*, 117 F.3d 24, 27 (1st Cir.), cert. denied, 522 U.S. 975 (1997); *United States* v. *Bahadar*, 954 F.2d 821, 826 (2d Cir.), cert. denied, 506 U.S. 850 (1992); *United States* v. *Abbas*, 74 F.3d 506, 511-512 (4th Cir.), cert. denied, 517 U.S. 1229 (1996); *Autry* v. *Estelle*, 706 F.2d 1394, 1400-1401 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Mohney*, 949 F.2d 1397, 1401 (6th Cir. 1991), cert. denied, 504 U.S. 910 (1992); *United States* v.

Hooks, 848 F.2d 785, 798-799 (7th Cir. 1988); *United States* v. *Bowling*, 239 F.3d 973, 976 (8th Cir. 2001); *United States* v. *Mendia*, 731 F.2d 1412, 1414 (9th Cir.), cert. denied, 469 U.S. 1035 (1984); *United States* v. *LaHue*, 261 F.3d 993, 1014 (10th Cir. 2001), cert. denied, 534 U.S. 1083 and 1084 (2002); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987); *United States* v. *Perkins*, 138 F.3d 421, 424 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998).

The Third Circuit stands alone in taking the contrary view. In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 969 (1980), decided before this Court's decisions in *Conboy* and *Doe*, the Third Circuit held that district courts, in limited circumstances, have inherent authority to grant "judicial" immunity even in the absence of a request from the prosecution. The court stressed that "immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." *Id.* at 972. In later cases, the Third Circuit has "decline[d] to extend further the rule announced in *Smith*." *United States* v. *Lowell*, 649 F.2d 950, 965 (1981). Indeed, the court has narrowed *Smith*, restricting immunity to situations where there is "a probable certainty" that the testimony will exonerate the defendant. *Ibid.*

Although petitioner suggests (Pet. 11) that the Eighth Circuit has stated that judicial immunity may be available in certain extraordinary circumstances, that court "has consistently refused to recognize the concept of 'judicial' immunity." *United States* v. *Bordeaux*, 436 F.3d 900, 905 (2006) (citation omitted). The court has

stated in dicta that, "assuming a district court has such authority," it would be an "extraordinary remedy" available "only where the proffered evidence is clearly exculpatory," *United States* v. *Kehoe*, 310 F.3d 579, 591 (2002) (quoting *United States* v. *Blanche*, 149 F.3d 763, 767 (8th Cir. 1998)), cert. denied, 538 U.S. 1048 (2003), but the Eighth Circuit has never ordered or approved a grant of judicial immunity.[1]

This case is not an appropriate one in which to resolve the disagreement between the Third Circuit and the other courts of appeals, because petitioner would not be entitled to immunity even under the Third Circuit's rule (or the Eighth Circuit's dicta). As the court of appeals concluded, the purported testimony of petitioner's potential witnesses was not exculpatory. Pet. App. 18a-25a. Nor was it essential to the defense, because it would not have "affected the total mix of evidence before the jury." *Id.* at 19a. Moreover, in this case, unlike in *Smith*, there were "strong governmental interests which countervail against a grant of immunity." 615 F.2d at 972. As the government explained in the affidavit submitted to the district court, petitioner's witnesses were potential targets of prosecution. See Pet. App. 90a. The Third Circuit has held that "[a] potential prosecution of

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[1] Petitioner incorrectly suggests (Pet. 14-15) that, in *United States* v. *Reyes*, 362 F.3d 536, 542 n.7, cert. denied, 542 U.S. 945 (2004), the Eighth Circuit stated that a court should grant defense witness immunity when a prosecution witness testifies to out-of-court statements by a potential defense witness who has invoked his Fifth Amendment privilege. The question whether use immunity should have been granted was not before the court in *Reyes*. And, although the court indicated that a grant of immunity might be helpful to the defense in the circumstance described by petitioner, the court reiterated that "[c]ourts in this circuit cannot grant 'judicial' use immunity." *Ibid.* (citation omitted).

the prospective witness is a sufficient governmental interest to countervail a grant of judicial immunity." *United States* v. *Cohen*, 171 F.3d 796, 802 (1999).

b. All the courts of appeals have stated—or declined to rule out the possibility—that a district court may, in narrow circumstances, compel the government to choose between providing immunity for defense witnesses or facing either dismissal of the case or preclusion of the testimony of its own immunized witnesses.[2] Although the courts differ somewhat in their articulations of when immunity may be compelled, they all essentially require that the government abuse the power to grant immunity by "intentionally attempting to distort the fact-finding process." *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); see *United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *Smith*, 615 F.2d at 968; *Abbas*, 74 F.3d at 512; *Autry*, 706 F.2d at 1400; *Mohney*, 949 F.2d at 1402; *Hooks*, 848 F.2d at 799, 802; *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Lord*, 711 F.2d 887, 891 (9th Cir. 1983); *LaHue*, 261 F.3d at 1014; *Sawyer*, 799 F.2d at 1507; *Perkins*, 138 F.3d at 424 n.2.[3]

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[2] Contrary to petitioner's contention (Pet. 11), neither the District of Columbia nor the Fifth Circuit has flatly rejected compelled defense immunity. The D.C. Circuit has stated that it has not yet been presented with an appropriate case, see *Perkins*, 138 F.3d at 424 n.2; *United States* v. *Lugg*, 892 F.2d 101, 104 (1989), and the Fifth Circuit has stated that immunity can be compelled only if there is governmental abuse, see *Autry*, 706 F.2d at 1400-1401; *United States* v. *Whittington*, 783 F.2d 1210, 1219-1220, cert. denied, 479 U.S. 882 (1986).

[3] Many courts also require that the testimony of the witnesses be exculpatory. See, *e.g.*, *LaHue*, 261 F.3d at 1015 (testimony must be

The courts of appeals have identified two circumstances that present the necessary governmental abuse: (1) when the government has intimidated or harassed a potential defense witness and thereby encouraged the witness to invoke his Fifth Amendment privilege; and (2) when the government has deliberately withheld immunity from a prospective witness for the sole purpose of keeping evidence from the jury. *Angiulo*, 897 F.2d at 1192 (describing the two circumstances and citing illustrative cases from various circuits); see *United States* v. *Westerdahl*, 945 F.2d 1083, 1086-1087 (9th Cir. 1991) (describing the two different scenarios); *Burns*, 684 F.2d at 1077 (requiring that government have "engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, [have] forced the witness to invoke the Fifth Amendment").

Neither of those circumstances exists here. See Pet. App. 19a ("There is no evidence of 'overreaching' or manipulation of immunity expressly for tactical reasons."). Petitioner never claimed that the government intimidated Beaumont, Scott, and Lomenzo, or otherwise affirmatively encouraged them to invoke the Fifth Amendment. Nor was the government's refusal to grant immunity without valid justification. All three witnesses were unindicted co-conspirators, and the government had legitimate concerns that grants of immunity could impede future prosecutions. Where, as here, a prosecutor refuses to grant immunity to defense witnesses whom he

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"material, exculpatory, and noncumulative"); *Abbas*, 74 F.3d at 512 (testimony must be "material, exculpatory and unavailable from all other sources"); *Burns*, 684 F.2d at 1077 (testimony must be "material, exculpatory, and not cumulative and is not obtainable from any other source"). As discussed above, that requirement is not satisfied here. See Pet. App. 18a-25a.

believes were engaged in the very criminal conduct that is the subject of the trial, the courts of appeals that have considered the issue agree that compelled immunity is not warranted. See *Angiulo*, 897 F.2d at 1193; *United States* v. *Turkish*, 623 F.2d 769, 778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *Lowell*, 649 F.2d at 965; *United States* v. *Mitchell*, 886 F.2d 667, 670 (4th Cir. 1989); *Mohney*, 949 F.2d at 1402; *United States* v. *Condo*, 741 F.2d 238, 239 (9th Cir. 1984), cert. denied, 469 U.S. 1164 (1985); see also *Autry*, 706 F.2d at 1401, 1403 (upholding district court's refusal to compel immunity where court had concluded that denial of immunity was "based on a legitimate, bona fide concern that giving use immunity to" the witness "might jeopardize a later prosecution" of the witness "for any crime related to his immunized testimony"); *Hooks*, 848 F.2d at 802 (noting that it is the prosecutor's "prerogative to decide not to seek immunity simply because the government would gain nothing and the immunity would hinder future actions"); *id.* at 799 (quoting, with apparent approval, the statement in *Turkish*, 623 F.2d at 778, that courts should reject immunity when the "witness for whom immunity is sought is an actual or potential target of prosecution").

Thus, petitioner's request for immunity for his witnesses would have been denied in any circuit. This case is therefore not an appropriate one in which to resolve any tension that may exist among the courts of appeals on the standard for compelling use immunity.

c. Petitioner contends (Pet. 18-19) that his request for immunity would have been granted in the Third, Eighth, and Ninth Circuits, as well as in the Sixth and Seventh Circuits. That contention is incorrect, as the above discussion indicates.

Petitioner does not satisfy the requirements in the Third Circuit (or in Eighth Circuit dicta) for a grant of judicial immunity because the testimony of his witnesses would not have exculpated him and was not essential to his defense. As for compelled statutory immunity, both the Third and the Eighth Circuits require a showing that the prosecutor acted "with the deliberate intention of distorting the judicial fact finding process." *Smith*, 615 F.2d at 968 (citation omitted); see *Capozzi*, 883 F.2d at 613. That requirement was not met here because petitioner's witnesses were themselves potential targets of prosecution for crimes arising out of the very conduct at issue in petitioner's trial.

For the same reason, the Ninth Circuit also would not have compelled the government to grant immunity. Petitioner notes (Pet. 13) that, in a case affirming the denial of a motion to compel immunity, that court stated that "[t]he use of immunized testimony for the prosecution, while denying immunity to a defense witness who would directly contradict that of the government witness(es), distorts the fact-finding process." *United States* v. *Alvarez*, 358 F.3d 1194, 1216 (brackets in original) (citing *United States* v. *Young*, 86 F.3d 944, 948 (9th Cir. 1996) (discussing *Westerdahl*, 945 F.2d at 1087)), cert. denied, 543 U.S. 887 (2004). The Ninth Circuit has explained, however, that such selective immunization does not constitute an "improper distortion of the fact-finding process by the government" when the witness that the government declined to immunize is facing prosecution on the same or related charges. See *United States* v. *Croft*, 124 F.3d 1109, 1117 (1997) (distinguishing *Young* and *Westerdahl* on that basis). The Ninth Circuit has also held that a motion to compel immunity was properly denied where "[t]he witnesses were them-

selves the target of prosecutorial investigation." *Condo*, 741 F.2d at 239. Taken together, the Ninth Circuit's cases indicate that immunity should not be compelled where, as here, the witness for whom immunity was denied is an actual or potential defendant on related charges.[4]

Petitioner is also incorrect in contending that his immunity request would have been granted in the Sixth and Seventh Circuits because the absence of immunity resulted in an "egregious imbalance" in access to evidence. Pet. 19. That contention cannot be squared with the court of appeals' conclusion that the testimony of petitioner's witnesses would not have "affected the total mix of evidence before the jury." Pet. App. 19a. The contention also depends on a misunderstanding of the standard that the Sixth and Seventh Circuits apply in deciding whether to compel immunity. Although those courts have, in dicta, referred to the possibility that immunity might be required if there were "egregiously lopsided access to evidence," *United States* v. *Talley*, 164 F.3d 989, 997 (6th Cir.) (quoting *Mohney*, 949 F.2d at 1402), cert. denied, 526 U.S. 1137 (1999); *Hooks*, 848 F.2d at 802-303 (quoting *United States* v. *Buljubasic*,

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[4] Petitioner also states that the Ninth Circuit does not require "threats or intimidation" to justify the compulsion of immunity. Pet. 13-14 & n.11 (citing *Westerdahl*, 945 F.2d at 1087). That statement is true as far as it goes, but the critical fact is that the Ninth Circuit does require some form of "prosecutorial misconduct." *United States* v. *Paris*, 827 F.2d 395, 401 n.3 (1987); see *Westerdahl*, 945 F.2d at 1087 (defendant must show that government "intentionally" distorted the fact-finding process). There was no such misconduct here. Moreover, to the extent there is any inconsistency among or lack of clarity in the Ninth Circuit's decisions, the Ninth Circuit, rather than this Court, should resolve it. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

808 F.2d 1260, 1268 (7th Cir.), cert. denied, 484 U.S. 815 (1987)), neither court has ordered or upheld compelled immunity on that basis. See *Buljubasic*, 808 F.2d at 1268. Rather, both those circuits require intentional distortion of the fact-finding process, which did not occur here. See *Mohney*, 949 F.2d at 1402; *Hooks*, 848 F.2d at 799, 802.

d. Petitioner also argues (Pet. 14, 17) that the Second Circuit's rule permitting the prosecutor to submit an in camera, ex parte affidavit declaring that a witness is a potential target of prosecution conflicts with the Ninth Circuit's requirement that the district court hold a hearing on the issue. The Ninth Circuit, however, requires a hearing only when the defendant establishes an unrebutted prima facie showing of prosecutorial misconduct, *Westerdahl*, 945 F.2d at 1086, and petitioner did not meet that burden here. The government's affidavit established its legitimate interest in refusing to grant immunity to petitioner's unindicted co-conspirators and rebutted any claim of prosecutorial misconduct. Moreover, because the confidential information in the affidavit could not be aired in a public hearing, the submission of an in camera, ex parte affidavit should be sufficient to satisfy the Ninth Circuit's "hearing" requirement. Cf. *United States* v. *Lapsley*, 263 F.3d 839, 842 (8th Cir. 2001) (In deciding whether the identity of informants must be disclosed pursuant to *Roviaro* v. *United States*, 353 U.S. 53 (1957), "several circuits have determined that * * * the case should be remanded to the district court, where an *in camera* hearing can be conducted to determine whether the [informant's] testimony is relevant to the case. * * * Such a procedure limits the extent of the disclosure of the informant's identity and

information, and protects the state's interest in avoiding unnecessary disclosure.").[5]

e. Petitioner also contends (Pet. 19-20) that the court of appeals' use of the abuse-of-discretion standard to review the district court's immunity decision conflicts with the Fourth and Ninth Circuits' application of de novo review. Although there is a conflict among the courts of appeals on the standard of review, see Pet. App. 14a (listing cases), this case is not an appropriate one in which to resolve it.

Petitioner did not argue for de novo review in the court of appeals, so his claim is at most subject to "plain error" review. For that reason, this case is a poor vehicle to address any conflicts among the courts of appeals on the appropriate standard of review. Indeed, because the courts of appeals are divided on the issue, and the majority of the circuits apply abuse-of-discretion review, see Pet. App. 14a, any error in applying that standard of review cannot be "plain." See, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 127 S. Ct. 247 (2006).

This case is also an unsuitable one in which to decide the appropriate standard of review because the choice between the two standards would not make any difference to the outcome. The district court's decision not to

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[5] In any event, the court of appeals did not address the district court's decision not to hold a more elaborate hearing. This case is therefore not an appropriate one in which to resolve any disagreement between the Second and Ninth Circuits on when a hearing is required and what it must entail. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below").

compel immunity was correct even if reviewed de novo, for the reasons described above. See pp. 12-18 *supra*.

In addition, the court of appeals correctly applied abuse-of-discretion review. That standard reflects that the district courts enjoy an institutional advantage in balancing "the needs of the parties and the centrality of particular pieces of evidence to a trial." Pet. App. 15a. Contrary to petitioner's contention, this Court's cases do not establish an absolute rule that mixed questions of law and fact must always be reviewed de novo. Cf. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995) ("the reviewing attitude that a court of appeals takes toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts") (internal quotation marks and citation omitted).

2. Petitioner also contends (Pet. 20-30) that this Court should grant a writ of certiorari because the court of appeals erred in upholding the conscious avoidance instruction. The court of appeals correctly upheld the instruction, and this Court's review is not warranted.

a. Petitioner first argues that "[a] conscious avoidance instruction should never be permitted where a criminal statute requires a jury to find that the defendant acted knowingly." Pet. 21. "It is well settled," however, "that willful blindness or conscious avoidance is the legal equivalent to knowledge." *United States* v. *Antzoulatos*, 962 F.2d 720, 724 (7th Cir.), cert. denied, 506 U.S. 919 (1992). For that reason, no court of appeals has held that a conscious avoidance instruction is prohibited whenever a criminal statute requires that a defendant acted knowingly.

A conscious avoidance charge "alert[s] the jury that the avoidance of knowledge of particular facts may cir-

cumstantially show that the avoidance was motivated by sufficient guilty knowledge to satisfy the specific criminal statute." *United States* v. *Ochoa-Fabian*, 935 F.2d 1139, 1141 (10th Cir. 1991), cert. denied, 503 U.S. 961 (1992). See *United States* v. *Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (deliberate ignorance instruction "is premised on the belief that acts conducted under the guise of deliberate ignorance and acts committed with positive knowledge are equally culpable"); *United States* v. *Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991) ("The willful blindness instruction allows the jury to impute the element of knowledge to the defendant."); *United States* v. *Ramsey*, 785 F.2d 184, 190 (7th Cir.) ("[A] person who has enough knowledge to prompt an investigation and then avoids further knowledge really does 'know' all that the law requires."), cert. denied, 476 U.S. 1186 (1986).

Accordingly, all the courts of appeals have upheld conscious avoidance instructions in cases where knowledge was an element of the offense. See *United States* v. *Cincotta*, 689 F.2d 238, 243 n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Caminos*, 770 F.2d 361, 366 (3d Cir. 1985); *United States* v. *Whittington*, 26 F.3d 456, 461-462 (4th Cir. 1994); *United States* v. *Fierro*, 38 F.3d 761, 772 (5th Cir. 1994), cert. denied, 514 U.S. 1030 and 1051 (1995); *United States* v. *Warshawsky*, 20 F.3d 204, 210-211 (6th Cir. 1994); *Ramsey*, 785 F.2d at 189; *United States* v. *Jensen*, 69 F.3d 906, 912 (8th Cir. 1995), cert. denied, 517 U.S. 1169 (1996); *United States* v. *Jewell*, 532 F.2d 697, 700-704 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Ochoa-Fabian*, 935 F.2d at 1141-1142; *United States* v. *Adair*, 951 F.2d 316, 319 (11th Cir. 1992); see also *United States* v. *Mellen*, 393

F.3d 175, 181 (D.C. Cir. 2004) (approving conscious avoidance instruction in dicta).

The instruction in this case did not dilute the knowledge requirement of petitioner's offenses or permit his conviction on proof of mere negligence. The instruction stated that the jury could find that petitioner acted knowingly if it found beyond a reasonable doubt that he "was aware that there was a high probability of a fact," but that he "deliberately and consciously avoided confirming this fact." Pet. App. 110a. The instruction expressly cautioned that the necessary knowledge could not be established by showing that petitioner was "careless, negligent, or foolish," or by virtue of his position as CEO. *Ibid.* Moreover, the court instructed the jury that it could not consider petitioner's "deliberate avoidance" as the "equivalent of knowledge" if petitioner "actually believed the fact not to be true." *Ibid.*

b. Petitioner further argues that, even if a conscious avoidance instruction is permissible in certain circumstances, the courts of appeals disagree about its application, and this Court's review is warranted to resolve that disagreement. Although the courts of appeals employ somewhat different standards to determine when a conscious avoidance instruction is warranted, it is not clear that the difference in the standards affects the outcomes of cases. And the difference in the standards did not affect the outcome here.

Most courts of appeals, like the court below, have held that a conscious avoidance instruction may be given when there is evidence to support the inference that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact. See Pet. App. 28a (citing *United States* v. *Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995), cert. denied, 516 U.S. 1072

(1996)); Pet. 25 (citing cases from the Third, Fourth, Fifth, Sixth, and Seventh Circuits).[6]

Some courts of appeals require an additional showing that the defendant avoided confirmation "in order to have a defense in the event of a subsequent prosecution." *United States* v. *Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (citation omitted); see *United States* v. *Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States* v. *Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States* v. *Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir.), cert. denied, 519 U.S. 1047 (1996). It is not clear, however, that this requirement actually adds to the government's burden. Indeed, in *United States* v. *Bilis*, 170 F.3d 88, 92, cert. denied, 528 U.S. 911 (1999), the First Circuit used two formulations of the standard for giving the instruction, one which included the additional requirement and one which omitted it. The court treated the two formulations as equivalent, using them interchangeably. See *id.* at 92-93. That is not surprising because it will frequently, if not invariably, be a reasonable inference that a defendant who consciously avoided confirming incriminating facts did so in the hope of avoiding liability.

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[6] Petitioner contends that the Second Circuit "has loosened this standard further" by stating that, in certain very suspicious circumstances, a defendant's "failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." Pet. 25 (quoting *United States* v. *Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004)). Petitioner does not explain how that elaboration on the application of the general standard in a specific context "loosen[s] th[e] standard." In any event, the court of appeals did not rely on the *Svoboda* elaboration in upholding the instruction in this case, see Pet. App. 28a-30a, and that issue is therefore not presented here.

In any event, it would not have been error to give a conscious avoidance instruction in this case under any circuit's standard. At trial, petitioner claimed not to know that the public filings contained false statements or that WorldCom had inaccurately reported its revenue and line costs. But petitioner was briefed by Sullivan and others about WorldCom's deteriorating financial condition, and he received a variety of financial reports that revealed both the company's troubled finances and the improper adjustments that were made to fraudulently inflate its financial status. Nonetheless, petitioner deliberately took no action to confirm the suspicious financial information that he received. He testified that he did not review many of the relevant reports —and even discarded one of them in the trash. He further testified that, when he did read the reports, he did not notice the suspicious line-cost figures. He similarly failed to seek an explanation for the large increase in capital expenditures that resulted from the misreporting of the line costs. It is difficult to conceive why petitioner would have pursued this effort at conscious avoidance except to insulate himself from liability.[7]

Indeed, this case presents the paradigm of when a conscious avoidance instruction should be given, and petitioner has not cited any case holding a conscious avoidance instruction inappropriate on facts similar to those here. See, *e.g.*, *United States* v. *Epstein*, 426 F.3d 431, 440 (1st Cir. 2005) (high level officer at company, who must have been well aware of fraudulent practices,

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[7] In addition, the jury instruction indicated that petitioner's efforts to avoid knowledge had to be made for the purpose of avoiding liability. See Pet. App. 110a ("one may not willfully and intentionally remain ignorant of a fact material and important to his conduct *in order to escape the consequences of criminal law*") (emphasis added).

"consciously chose deliberate ignorance of the fraudulent scheme"), cert. denied, 126 S. Ct. 1596 (2006); *United States* v. *Parker*, 364 F.3d 934, 946-947 (8th Cir. 2004) (deliberate ignorance instruction was appropriate where president of company intentionally remained "willfully blind to the inaccuracy of the data" by failing to gather information that he had collected in the past); *United States* v. *Caterino*, No. 90-50049, 1992 WL 33347, at *5 (9th Cir. Feb. 21, 1992) ("Appellants' positions of responsibility at [telemarketing company] coupled with the suspicious circumstances under which [company] operated rendered the [conscious avoidance] instruction appropriate."), cert. denied, 506 U.S. 843 (1992); *United States* v. *Gold*, 743 F.2d 800, 822 (11th Cir. 1984) ("There was clearly enough evidence presented here on the issue of conscious avoidance or deliberate ignorance to justify supplying an instruction on this issue to the jury. The entire defense case, after all, rested on the argument that the defendants—despite their supervisory responsibilities and 'hands-on' management style—were innocently oblivious to the endemic fraud that permeated [company's] entire * * * operation."), cert. denied, 469 U.S. 1217 (1985).

c. Petitioner also claims that some courts of appeals have held, in conflict with the court below, that a conscious avoidance instruction may not be given "where the government's case is based primarily on a theory of actual knowledge." Pet. 27. The cases cited by petitioner do not stand for that proposition. See *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1074 (9th Cir. 1991) ("if there is evidence of both actual knowledge *and* of deliberate ignorance, a [conscious avoidance] instruction is appropriate" (citation omitted)); *Bilis*, 170 F.3d at 93 ("[t]his court has rejected the argument that proof

of direct knowledge precludes a willful blindness instruction that is otherwise appropriate"); *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991) ("it is possible for the government to present evidence showing the defendant had actual knowledge and evidence of defendant's avoidance of that same knowledge"). Instead, they stand for the unremarkable proposition that a conscious avoidance instruction is not appropriate if the evidence points *only* to either direct knowledge or lack of knowledge, which was not the case here. See, *e.g.*, *Sanchez-Robles*, 927 F.2d at 1074.

Petitioner further contends that the cases he cites hold that "the government cannot rely on the same evidence to show both actual knowledge and conscious avoidance." Pet. 28. Only the Tenth Circuit's decision in *de Francisco-Lopez* so holds,[8] and that court has since disavowed that position. See *Espinoza*, 244 F.3d at 1244. A rule that the government may not rely on the same facts to establish actual knowledge and conscious avoidance would be incorrect. Evidence of highly suspi-

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[8] The Ninth Circuit cases cited by petitioner hold only that the particular evidence at issue in those cases supported an inference only of actual knowledge and did not support an inference of conscious avoidance. See *Sanchez-Robles*, 927 F.2d at 1075; *United States* v. *Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1099 (9th Cir. 1985); *United States* v. *Beckett*, 724 F.2d 855, 856 (9th Cir. 1984); *United States* v. *Garzon*, 688 F.2d 607, 609 (9th Cir. 1982). Although the First Circuit cases cited by petitioner contain language suggesting that evidence of actual knowledge and conscious avoidance must be distinct, the court upheld the conscious avoidance instructions in both cases. See *Bilis*, 170 F.3d at 93; *United States* v. *Brandon*, 17 F.3d 409, 452-453 & n.74 (1st Cir.), cert. denied, 513 U.S. 820 (1994). We are not aware of any case in which the First Circuit has held a conscious avoidance instruction inappropriate because the government relied on the same evidence to support both theories of knowledge.

cious circumstances may frequently be sufficient to establish either that the defendant knew that he was committing a crime or that he knew so much that he must have consciously avoided confirming that he was participating in a crime. See, *e.g.*, *Espinoza*, 244 F.3d at 1243-1244 ("we believe that the jury in this case could properly draw inferences from the evidence adduced at trial that support either a finding of actual knowledge or deliberate ignorance"); *United States* v. *Arias*, 984 F.2d 1139, 1143 (11th Cir.) (where evidence supports both actual knowledge and deliberate ignorance, a deliberate ignorance instruction is correctly given), cert. denied, 508 U.S. 979 and 509 U.S. 932 (1993).

d. Finally, even assuming that it was error to give a conscious avoidance instruction in this case, that error was harmless. The government primarily argued that petitioner actually knew about the fraud and made only a brief reference to his conscious avoidance of the relevant facts. Moreover, the government presented overwhelming evidence of petitioner's actual knowledge, including Sullivan's testimony that he informed petitioner that WorldCom could "hit its numbers" only by taking "short cuts" and making entries that were improper, and that petitioner instructed him to make those entries anyway. Indeed, because the jury was correctly instructed on a theory of actual knowledge that was supported by the facts of the case, any error in instructing the jury on a theory of conscious avoidance that may not have been supported by the facts was harmless. See *Griffin* v. *United States*, 502 U.S. 46 (1991) (so long as jury was instructed on theory that was supported by the facts of

th[illegible]se, conviction will not be reversed if alternate theory is not supported by sufficient evidence).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] In *Tomala* v. *United States*, 504 U.S. 932 (1992), the government suggested that the Court grant a petition for a writ of certiorari that presented the question whether the district court had correctly instructed the jury on knowledge. In that case, however, the instruction, based on the Model Penal Code definition of "knowledge," told the jury that the government could prove knowledge by establishing that the defendant was "aware of a high probability" of a fact, unless the defendant actually believed the fact was not true. See *ibid.*; Model Penal Code § 2.02(7) (2001). The instruction in this case was significantly different. It did not require, but instead permitted, the jury to draw an inference that the defendant acted with knowledge, and it required the government to prove that the defendant "deliberately and consciously avoided confirming th[e] fact" before the jury could draw that inference. Pet. App. 110a. The instruction also specifically informed the jury that it could not find that petitioner had knowledge of a fact "merely because he held the position of chief executive at WorldCom." *Ibid.* In any event, this Court denied review in *Tomala*, and there is considerably less reason to grant review here.